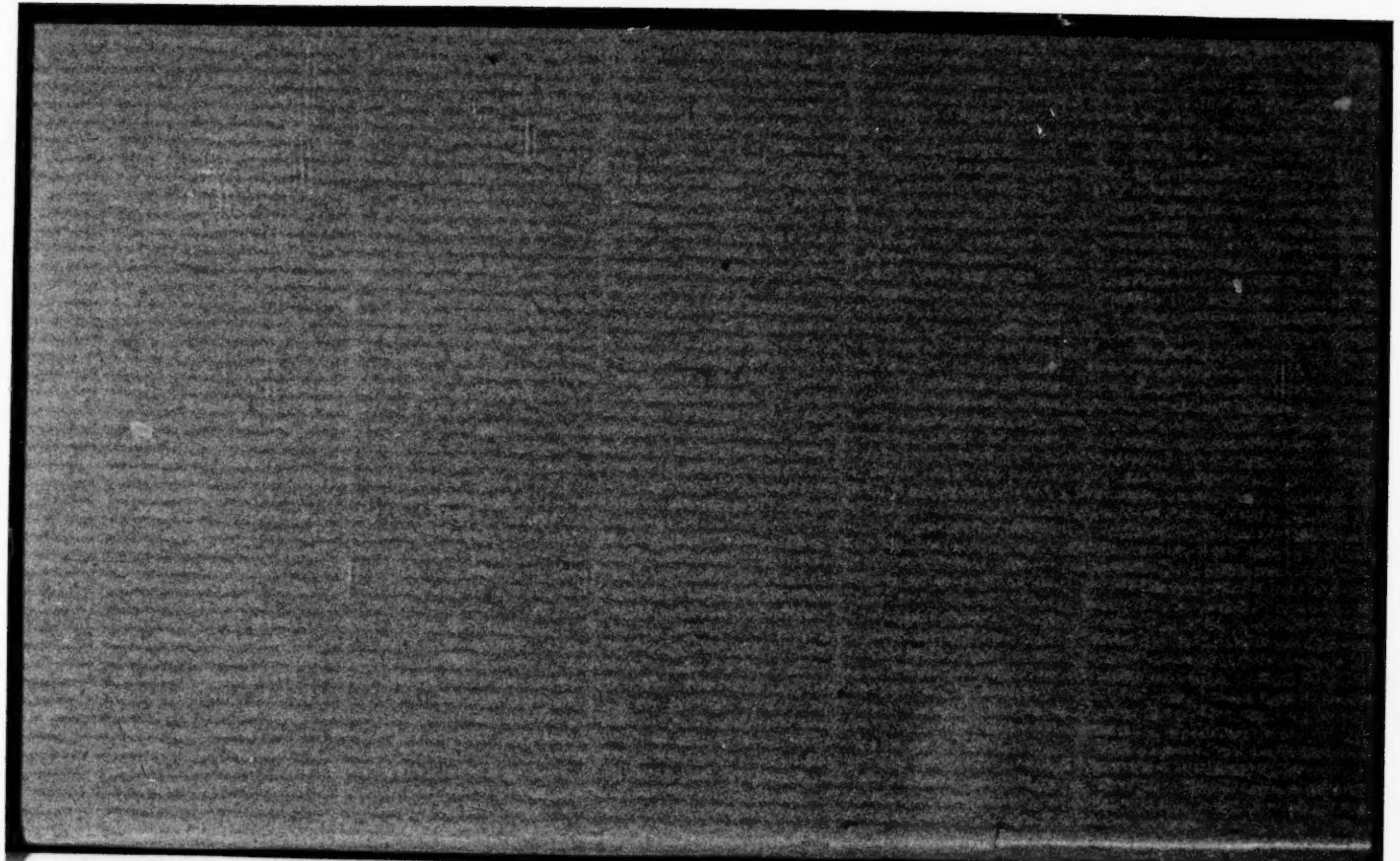
EDWARD F. O'BRIEN,

Respondent.

Petition of Libellants for Writ of Certiorari.

BUTLER, STILLMAN & HUBBARD,

Proctors for Petitioners.



United States Circuit Court of Appeals

SECOND JUDICIAL CIRCUIT.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,
Libellants,

AGAINST

EDWARD E. O'BRIEN,
Respondent.

Notice is hereby given that upon the petition of the libellants above named, verified the 23d day of April, 1895, and upon all the pleadings and proceedings herein, we shall, on Monday, the 29th day of April, 1895, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington.

New York, April 23d, 1895.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

TO GEORGE A. BLACK, ESQ.,
Proctor for Respondent.

SUPREME COURT OF THE UNITED STATES.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,

Libellants,

AGAINST

EDWARD E. O'BRIEN,

Respondent.

And now come Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, by Wilhelmus Mynderse, their advocate, and move this Honorable Court for a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all of the proceedings by them had in the suit now or lately before them, wherein Brice Alan Miller, Thomas Denison Camber, John Manley Lowe, John Isdaile Smail and Alfred Naylor were libellants, and Edward E. O'Brien was respondent.

WILHELMUS MYNDERSE,
Advocate for Petitioners.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit to bring before the Supreme Court of the United States a certain

suit in admiralty wherein they are libellants against Edward E. O'Brien, respondent, respectfully shows:

FIRST. At all the times hereinafter mentioned the petitioners Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor were copartners doing business in Valparaiso, Chili, under the firm name of Gibbs & Company, and the respondent was a resident of Maine and owner of the American ship *Andrew Johnson*.

SECOND. In June and July, 1884, the petitioners shipped on board the *Andrew Johnson* at Iquique Bay 10,399 bags of nitrate of soda, and at Caleta Buena 9,544 bags of nitrate of soda, to be transported on said vessel to Hamburg, Germany, and there to be delivered to the order of Antony Gibbs & Son in London.

On the 15th day of July, the ship, under the command of her master J. H. Killeran, sailed with all this cargo from her last loading port, Caleta Buena, for Hamburg, and soon thereafter, while in the prosecution of her voyage, suffered from heavy weather to such extent that she necessarily sought a port of refuge. She went into Callao, where, after surveys, it was determined that she could not prudently continue her voyage without repairs. Under the recommendation of surveyors she was lightened of cargo for examination and her injuries located. The surveyors recommended that the top sides and waterways be horsed and calked; the main decks calked; the hood ends carefully overhauled and refastened where necessary, and calked. They further recommended that at least 1,200 tons of the cargo be forwarded in another bottom, and they reported that, with such repairs and thus lightened, the vessel could proceed on her voyage with safety. Their recommendations were made, as stated in their report, in the interest of both the owners of ship and cargo.

THIRD. The master of the *Andrew Johnson*, in accordance with the recommendations of the survey, shipped 8,449 bags of his cargo, weighing about 1,130 tons, upon another vessel, the *Mary J. Leslie*. The shipment was made in the name of J. H. Killeran as master, and the bill of lading bore the follow-

ing endorsement, signed by W. H. McLeod, master of the *Mary J. Leslie :*

"8,449 bags of nitrate of soda as per this bill of lading are "included in and jointly responsible with the nitrate of soda "specified in the bottomry and respondentia bond given to "Messrs. Grace Brothers & Co. as security for the payment "of the American ship *Andrew Johnson's* disbursements in "Callao."

FOURTH. For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment and stowage of cargo, the master of the *Andrew Johnson* incurred serious expenses. The vouchers for these expenses have been produced and proved and show an aggregate of 13,-237.72 Peruvian soles, equivalent to £2,212 5s 9d British sterling. In order to raise funds to meet these expenses the master made a bottomry bond in favor of Grace Brothers & Co. bearing date September 15th, 1884, for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599 8s 9d. For the payment of the bond he bound, obligated and hypothecated the *Andrew Johnson* and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie* and his freight. The bond was conditioned that the vessel should set sail from Callao and proceed to Hamburg and pay the bond within five days after arrival at final port of destination and "before commencing to discharge the cargo" and with the provision that if during the voyage there should be an "utter loss" of said vessel the bond should be void and that otherwise be and remain in full force and virtue. A full copy of the bond is set forth in the record filed herewith on *pages 13-17*.

FIFTH. Thereupon the two vessels, the *Andrew Johnson* and the *Mary J. Leslie*, sailed from Callao for Hamburg carrying their respective lots of cargo. The *Andrew Johnson* later met collision with the British ship *Thirlmere*, and was sunk in mid-ocean. The *Mary J. Leslie* arrived in regular course at Hamburg on February 5, 1885. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg.

SIXTH. On the 10th of February formal demand was made

upon Mr. Wirtz for the payment of the bond by Berenberg, Gossler & Co., as representatives of Baring Brothers & Co., of London, who were acting on behalf of the owners of the bond. No cargo had up to the time of formal demand been discharged from the *Mary J. Leslie*, and under the provisions of the German law it could not be discharged until the bond was paid or payment secured.

SEVENTH. On the 11th of February, in order to secure a release of the cargo, Antony Gibbs & Sons gave the following obligation to Baring Brothers & Co.:

"In consideration of your telegraphing Messrs. J. Berenberg, Gossler & Co., Hamburg, to withdraw their claim on your behalf in respect of bottomry and respondentia on the cargo of nitrate of soda to our order arrived by the British vessel *Mary J. Leslie*, we hereby engage to pay to you whatever proportion of the said bottomry and respondentia bond may be found to be legaily due from the said cargo, the question to be submitted to Messrs. Waltons, Bubb & Walton and Messrs. William Richards & Son, in London; or, if it be found to be governed by Hamburg law, to equally competent authorities there to be appointed by your agents and ours."

This engagement of Antony Gibbs & Sons was accepted the same day by Baring Brothers & Co. as follows:

"With reference to your letter of this date, we understand your guaranty to be equally binding should the case be decided to be governed by Hamburg law, and shall accordingly telegraph our friends in Hamburg to release the cargo of the *Mary J. Leslie*."

Thereupon the discharge of the cargo was commenced and was completed February 27th.

EIGHTH. In order to determine the amount legally due from that portion of the cargo transported on the *Mary J. Leslie*, Messrs. Berenberg, Gossler & Co. and Hugo Wirtz, representing respectively Baring Brothers & Co. and Antony Gibbs & Sons, submitted the question to Dr. Wolffson and Dr. Stammann, eminent and leading lawyers of Hamburg, who decided that the cargo on board the *Mary J. Leslie* was liable to the extent of its value for the whole of the bond. The value of

that portion of the cargo was about $40,000, and, therefore, far in excess of the amount of the bond.

Dr. Stammann and Dr. Wolffson gave their opinion March 14th as follows:

"HAMBURG, 14 March, 1885.

"HUGO WIRTZ, ESQRE
"MESSRS. J. BERENBERG, GOSSLER & CO,

"We formulate the question which you, in the names of "Messrs. Anthony Gibbs & Sons and Messrs. Baring Brothers "& Co have submitted to our judgment, as follows:

"'Whether the portion of the cargo of nitrate of soda of "'the *Andrew Johnson* brought home per *Mary J. Leslie* is "'liable for the whole amount of the Bottomry Bond which "'was signed in Callao and whether, consequently, the re-"'ceiver of this portion of the cargo has to pay the whole of "'the Bottomry Bond, provided the value of this portion of "'the cargo is not less than the amount of the Bottomry "'Debt?'

"This question we must answer in the affirmative because, "according to the law here, ship, freight and cargo of the "*Andrew Johnson*, as well as the portion of the cargo which "was transshipped into the *Mary J. Leslie* are jointly liable "for the whole amount raised on Lottomry at Callao, and "therefore the *Andrew Johnson* and her cargo having become "a total loss, the holder of the Bottomry Bond can come upon "that portion of the cargo which was shipped by the *Mary J.* "*Leslie* for the whole amount of his claim.

"Some doubt might be raised as to whether, according to "the wording of the Bottomry Bond, the money was not lent, "or appear to be lent contingent upon the safety of the "*Andrew Johnson*, and becoming due only after her arrival at "her port of destination; but becoming null and void in the "event of her non-arrival. We are of opinion, however, that "this interpretation is not consistent with the real intention of "the contracting parties, and that the wording referred to has "originated in the not sufficiently careful use and employment "of a form of Bond which happened to be at hand. This "seems the less doubtful to us for this reason, that if the "Bottomry Bond were interpreted in this manner the cargo of "the *Mary J. Leslie* would be entirely liberated after the loss "of the *Andrew Johnson* occurred, and would not even bear a "portion of the Bottomry Debt, which nevertheless has arisen "out of a case of General Average. Manifestly this cannot "have been the intention of the parties interested.

"Yours truly,
"J. OTTO STAMMANN,
"J. WOLFFSON."

Thereupon and on March 17th, 1885, Antony Gibbs & Sons paid to Baring Bros. & Co. the full sum of £2,592.7.9.

NINTH. The collision by which the *Andrew Johnson* and her cargo was sunk was due solely to the fault of the *Thirlmere*. The owner of the *Andrew Johnson* brought suit against the owners of the *Thirlmere* in England to recover damages for the loss of his vessel by the collision, valuing the vessel at $60,000. The owners of the *Thirlmere* limited their liability under the provisions of the British act to £8 sterling per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the *Andrew Johnson*, the respondent herein, received £5,179.13.6 on account of the loss of his ship, and £858.6.11 on account of her freight. The libellants received such proportion of the value of the *Thirlmere* as was due them in respect to the cargo sunk with the *Andrew Johnson*.

TENTH. After the payment of the bond by the libellants in Hamburg they caused an adjustment to be made in London by Messrs. William Richards & Sons, average adjusters, to show what portion of the expenses covered by the bond were properly chargeable against the owner of the *Andrew Johnson*, either as general or special charges, and what portion against the owners of the cargo.

ELEVENTH. In July, 1887, this action was instituted by the libellants claiming to recover from the respondent, as owner of the *Andrew Johnson*, the share of general and special charges properly falling upon the vessel which had been paid by the funds raised on bottomry. In that libel it was alleged, through error of the pleader, who had not been advised of the circumstances attending the sinking of the *Andrew Johnson*, that the *Andrew Johnson* and her freight had become a total loss. Under exceptions filed to the sufficiency of the libel, argument was had in April, 1888, and the general exception that no sufficient cause of action was stated was sustained, upon the ground that under the statutes of the United States the shipowner's liability was limited to the value of his sunken vessel. Subsequently amendments were made by which it appeared that the *Andrew Johnson* had not, in fact, become a total loss at sea, but had been sunk by the *Thirlmere*, and that the

owner of the *Andrew Johnson* had recovered by legal proceedings against the *Thirlmere* in Great Britain the sum of £6,557 9s. 6d. The libel as so amended is the one upon which the cause was tried in the District Court.

TWELFTH. The libel was sustained upon the trial, and it was ordered that the libellants "recover so much of the moneys "paid by them in satisfying the bottomry and respondentia "bond referred to in the libel as upon proper adjustment is "properly chargeable to the owner of the ship *Andrew Johnson* "and her freight." Reference was ordered to William A. Walker, as Special Commissioner, to ascertain and compute such amount. He found that the libellants were entitled to recover the principal sum of $6,091.73; for which sum, with interest and costs, a decree was entered in the District Court in favor of the libellants July 12, 1894, in the aggregate amount of $9,598.94.

THIRTEENTH. Appeal was taken from this decree by the respondent to the United States Circuit Court of Appeals for the Second Judicial Circuit, where it came on for argument in March, 1895. Decision was filed April 16, 1895, holding that the decree of the District Court should be reversed and that the libel should be dismissed with costs, upon the stated ground that by the strict language of the bottomry bond it became void when the *Andrew Johnson* was sunk at sea.

The eminent lawyers to whom this point among others had been presented in Hamburg had said:

"Some doubt might be raised as to whether, according to "the wording of the bottomry bond, the money was not lent, "or appeared to be lent, contingent upon the "safety of the *Andrew Johnson*, and becoming due "only after her arrival at her port of destination, but "becoming null and void in the event of her non-arrival; "we are of opinion, however, that this interpretation is not "consistent with the real intention of the contracting parties, "and that the wording referred to originated in the not sufficiently careful use and employment of a form of bond which "happened to be at hand. This seems the less doubtful to us "for this reason, that if the bottomry bond were interpreted in "in this manner, the cargo of the *Mary J. Leslie*, would be entirely liberated after the loss of the *Andrew Johnson* occurred, "and would not even bear a portion of the bottomry debt

" which, nevertheless, had arisen out of a case of general aver-
" age. Manifestly this cannot have been the intention of the
" parties interested."

The District Judge reached the same result in considering the exceptions to the original libel, at which time it was assumed that the *Andrew Johnson* and her freight had indeed become a total loss, he holding that the condition might be fairly construed as intended to mean that the only obligation that was to become void through the loss of the *Andrew Johnson* was the personal obligation of the master or his agreement to pay the loan, leaving the pledge operative upon any salvage recoverable or upon any portion of the pledged property reaching the port of destination *(Opinion on Exceptions, fols. 211, 212)*. Upon further consideration of the question at the time of the trial of the cause, at which time it appeared that the *Andrew Johnson* and her freight had not become an " utter loss," the District Judge adhered to the construction of the bond theretofore made by him, saying:

" It seems to me inconceivable that the parties should thus
" explicitly have embraced this part of the cargo in the bond
" without intending it to answer for the bottomry loan on safe
" arrival at Hamburg, even though the *Andrew Johnson* might
" perish. The ambiguous phraseology of the bond in using
" the term 'the said vessel' should be so construed as to effect-
" uate the obvious intention of the whole instrument by making
" the words 'the said vessel' include both vessels, that is, by
" interpreting the singular for the plural if necessary. *Ut res*
" *majis valeat quam pereat*" (Opinion, fols. 226, 227).

The United States Circuit Court of Appeals, in directing the reversal of the decree of the District Court, held that the condition of the bond,

" or if during the said voyage an utter loss of the said
" vessel by fire or enemies, pirates, the perils of the sea or
" navigation, or any other casualty, shall unavoidably happen to
" be sufficiently proved by the said James H. Killeran, then
" and in either of the said cases, this obligation shall be void
" or otherwise to be and remain in full force and virtue,"

was susceptible of strict construction; that the words "the said vessel" meant the *Andrew Johnson*, and could not be considered to refer to the *Mary J. Leslie*, and that the sinking of the *Andrew Johnson* at sea constituted " an utter loss," even

though the circumstances attending her sinking were such as to give to her owner a valuable right of recovery against the *Thirlmere*, which right he availed of to his profit. They accordingly held that the libellants were under no legal liability to pay the bond in Hamburg, and that their payment must be deemed a voluntary payment, giving them no remedy against the owner of the *Andrew Johnson*.

FOURTEENTH. Your petitioners aver that this case is one in which it is proper for this Court to issue a writ of *certiorari*, for the following reasons:

1st. Because there has been a disagreement between the District Judge (with whose opinion the Hamburg lawyers were in accord) and the United States Circuit Court of Appeals in the construction of a written instrument, there being no dispute of facts.

2d. Because the United States Circuit Court of Appeals have determined as a question of law, and in conflict with the decision of the District Judge, that the holders of the bottomry bond had no right to resort to the cargo transported on the *Mary J. Leslie* after the sinking of the *Andrew Johnson*.

3d. Because the United States Circuit Court of Appeals have held, in conflict with the decision of the District Judge, that the *Andrew Johnson* became in the contemplation of the bond "an utter loss," although by her sinking there was left to her owner a valuable right of recovery against the owners of the *Thirlmere*.

4th. Because the Supreme Court of the United States have never directly determined the measure of a shipowner's liability in the event of his vessel being lost through the act of a wrongdoer under such circumstances as to give him a valuable right of recovery against such wrongdoer,

The City of Norwich, 118 U. S., 468, 493, 503, 504,

though it is determined by that decision that a shipowner is not required to account for insurance money received by him under independent contracts of insurance.

5th. Because the Supreme Court of the United States have never determined that a vessel is an "utter loss" when she perishes under such circumstances that the very circumstances give to her owner a valuable right of recovery against the wrongdoer who has occasioned the physical destruction of the vessel.

6th. Because the questions involved are purely questions of law and of great importance to the commercial community.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring this cause before this Honorable Court, and for such other relief as to this Honorable Court may seem just.

BUTLER, STILLMAN & HUBBARD,
Proctors for Petitioners.

SOUTHERN DISTRICT OF NEW YORK, ss:

WILHELMUS MYNDERSE, being duly sworn, says that he is a member of the firm of Butler, Stillman & Hubbard, proctors for the libellants Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, and that he is authorized to make this verification on his own behalf. That he has read the foregoing petition and knows the contents thereof, and that the allegations contained therein are true according to deponent's information and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and in the record of the cause in the District Court and in the United States Circuit Court of Appeals.

Deponent further says that none of the libellants reside within the United States, but, on the contrary, reside in South America, where they now are, as deponent believes.

WILHELMUS MYNDERSE.

Sworn to before me this 23d day of April, 1895.

CHARLES C. NOTT, JR.,
Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the petition is well founded, and that the same is one in which the prayer of the petitioners should be granted.

WILLIAM ALLEN BUTLER.